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December 31, 2019

VIA FACSIMILE AND ECF

Honorable Nelson S. Román
The Hon. Charles L. Brieant Jr. Federal Building and U.S. Courthouse
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RE: *Busher v. Barry, et al.*, Case No. 14 Civ. 4322 (NSR) (JCM)

Your Honor:

Defendants write in response to Plaintiffs' letter dated December 30, 2019 (Doc No. 332).

Plaintiffs' letter incorrectly conflates cases in which a party *permanently* and *unconditionally* dismisses claims and cases addressing the *conditional* procedure Plaintiffs propose here. The case Plaintiffs cite involved a party completely and permanently abandoning remaining claims prior to commencing an appeal as to other aspects of the case. *See Joseph v. United States*, 740 F. App'x 12, 13-14 (2d Cir. 2018) ("Joseph's own request that the District Court dismiss the case in full so that he could immediately challenge the teaching of *Watson* and *Nwozuzu* could only be granted if Joseph abandoned or voluntarily dismissed with prejudice his remaining claims not implicated by *Watson* or *Nwozuzu*"). Indeed, Plaintiffs acknowledge that *Joseph* stands for the proposition that "[i]t is well-established that '[i]mmediate appeal is available to a party willing to suffer voluntarily the district court's dismissal of the whole action *with prejudice*.'" *Id.* (emphasis added).

Although Plaintiffs use the words "with prejudice" to describe their proposed dismissal of the remaining claims in this case, what they mean is "conditionally." If the Second Circuit reverses the Court's dismissal of claims based on earlier lease extensions, Plaintiffs propose that their claim based on the 2013 lease would be revived, exactly the situation rejected in *Microsoft v. Baker*, 137 S. Ct. 1702 (2017). *See also Bynum v. Maplebear Inc.*, 698 F. App'x 23 (2d Cir. 2017) (explaining that *Microsoft* prohibited similar end-runs around the finality rule).

If, in relying on *Joseph*, Plaintiffs are now proposing to permanently and unconditionally dismiss their remaining claims, Defendants would have no basis to object.

Respectfully submitted,

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